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TREATY WITH THE BAHAMAS ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-17]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, signed at Nassau on June 12 and August 18, 1987, with related notes, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties (MLAT's), treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

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Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) they fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a Central Authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

United States efforts to induce greater cooperation in law enforcement matters in the Caribbean have been multifacted. When Congress enacted the Caribbean Basin Initiative (CBI) in 1983, it included a number of conditions intended to induce greater cooperation in this area. Those countries wishing to become beneficiaries of the duty-free treatment provided for in the Act were required to take steps to cooperate with the United States against drug trafficking and to be signatory to some agreement providing

for the extradition of American citizens. Although the Bahamas was one of the primary targets of the CBI incentives, it did not seek to participate in the program. In fact, in late 1983, relations between the United States and the Bahamas hit an all time low when American DEA and FBI agents in the Bahamas were declared persona non grata.

The following year, the United States and the Bahamas sought to re-establish a more cooperative relationship. American law enforcement agents were invited back to the Bahamas and joint drug enforcement operations were undertaken. In January 1985, formal MLAT negotiations were undertaken.

On August 18, 1987, the United States signed a treaty with the Bahamas on mutual legal assistance in criminal matters. The treaty with the Bahamas can be a major step forward in United States efforts to enlist the cooperation of foreign "bank secrecy" jurisdictions in the investigation and suppression of transborder crime, particularly narcotics trafficking and money laundering.

In addition, the MLAT between the United States and the Commonwealth of the Bahamas will serve as a useful tool in making a determination under Section 481 of the Foreign Assistance Act of 1961, as amended by Pub. L. 99-570, the Anti-Drug Abuse Act of 1986, which requires that the President certify whether major drug producing or transit countries have cooperated fully with the United States in eradicating and interdicting illicit narcotics.

Purpose

The treaty provides for assistance in all matters involving the investigation, prosecution, and suppression of "criminal offenses." The use of the term "suppression" makes clear that the treaty could be invoked in matters where no criminal prosecution or investigation is under way, such as a civil forfeiture proceeding involving assets acquired through a criminal offense covered by the treaty.

The treaty generally conditions assistance on a showing of "dual criminality", that is whether the assistance requested relates to an act which would have constituted some criminal offense in the requested state. The treaty permits assistance to be granted in five specific areas without regard to dual criminality: crimes relating to illegal narcotics trafficking; theft and embezzlement; crimes of violence; fraud of various kinds; and violations of the laws involving currency or other transactions which contributed as an integral element to the commission of one of the crimes described above.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: taking testimony and statements; obtaining documents, records and evidence; executing requests for searches and seizures; and immobilizing forfeitable assets.

Committee Comments

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The Bahamas are a major transit point for narcotics trafficking and an important

international banking center. The MLAT with the Bahamas will assist U.S. efforts to obtain bank records and other evidence of narcotics-related money laundering.

The Government of the Bahamas has repeatedly asserted its willingness to cooperate fully under the MLAT and has already enacted enabling legislation in anticipation of its ratification by the Senate.

The Justice Department has advised the committee that the Bahamian authorities, working with the U.S. Attorney's office in Florida, have immobilized Norman's Cay, the island that had been rented or owned by Carlos Lehder or other drug traffickers. Justice Department officials stated that Bahamian officials represented to them that if the MLAT were in effect, the U.S. could utilize Article 14 of the treaty, relating to assisting in forfeiture proceedings, to facilitate the seizure and forfeiture of that island.

Justice Department officials also told the committee that if the MLAT were in effect, the U.S. could make a treaty request to force Nigel Bowe, wanted for trial in Miami for conspiring to import and distribute cocaine, to divulge the names of individuals he claims own Norman's Cay rather than Carlos Lehder. That evidence may be useful in the ongoing efforts of the United States to extradite Mr. Bowe to the United States.

The committee does not dispute that there are legitimate concerns about corruption within the Bahamian Government. However, it is the view of the committee that this treaty will enable the United States to deal with a certain quantum of criminal offenses in this country that it would not be able to deal with, at least not as effectively, if the treaty were not in force. In addition, with the treaty in place, the United States will have something more than anecdotal material to measure the Bahamas willingness to cooperate fully with the United States in the war on drugs.

The committee also notes that the bi-partisan anti-drug legislation which will be introduced shortly contains new drug certification procedures and criteria that directly address official corruption in drug source and transit countries.

Concern has been voiced that corrupt elements in a country could distort the treaty for personal or political reasons, seeking information through the MLAT process which would be detrimental to U.S. law enforcement efforts. Article 3 of the treaty explicitly permits the Requested State to deny assistance if execution of the request would prejudice the security or other "essential public interests" of the Requested States. In addition, Article 3(3) states that a request for assistance need not be executed where execution would interfere with an ongoing investigation or legal proceeding. The committee believes these explicit bases for denying a request for assistance, along with the Justice Department's scrutiny of each request for assistance, protects against prejudicing ongoing U.S. investigations or prosecutions.

During committee consideration of the treaty with the Bahamas, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the Constitutional rights of U.S. citizens. A reservation was proposed to each MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America

prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert*, 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also requires dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as banks records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already will regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

Committee Action

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony:

Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel, Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC. The hearing record on this treaty as well as the other five MLAT's is printed as an appendix to the committee report on the treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the treaty between the Government of the United States of America and the Commonwealth of the Bahamas on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3–5 vote with Senators Helms, Pressler and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

Senator Helms offered an amendment to the treaty conditioning ratification of the treaty on a Presidential certification "that the Bahamas do not have any senior government, military, or police official, or governor who engages in, encourages, or facilitates the production or distribution of illegal drugs." The amendment was defeated by a 4–13 vote with Senators Helms, Pressler, Trible, and McConnell voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, and Evans voting in the negative.

The committee voted 17–2 to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Trible, Evans, and McConnell. Nays: Senators Helms and Pressler.

Section-by-Section Analysis

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TECHNICAL ANALYSIS OF THE MUTUAL LEGAL ASSISTANCE TREATY BETWEEN THE UNITED STATES AND THE COMMONWEALTH OF THE BAHAMAS

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Technical Analysis of the Mutual Legal Assistance Treaty Between the United States of America and the Commonwealth of the Bahamas

On August 18, 1987, the United States signed a treaty with the Bahamas on mutual legal assistance in criminal matters. In recent years, the United States has signed similar treaties with many other countries, all as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases.[1] The treaty with the Bahamas is a major step forward in United States efforts to enlist the cooperation of foreign "bank secrecy" jurisdictions in the investigation and suppression of transborder crime.

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[1]Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, signed at Bern May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force Jan. 23, 1977)(hereinafter "U.S.-Swiss Treaty"); U.S.-Turkey Treaty on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara June 7, 1979, 32 UST 311, TIAS 9891 (entered into force Jan. 1, 1981)("U.S.-Turkey Treaty"); U.S.-Netherlands Treaty on Mutual Assistance in Criminal Matters, signed at the Hague June 12, 1981, TIAS 10734 (entered into force Sept. 15, 1983)("U.S.-Netherlands Treaty"); U.S.-Colombia Mutual Legal Assistance Treaty, signed at Washington Aug. 20, 1980, ratification advised by the Senate Dec. 2, 1981 and instrument of ratification signed by the President Jan. 4, 1981 (not yet ratified by Colombia)("U.S.-Colombia Treaty"); U.S.-Italy Mutual Legal Assistance Treaty, signed at Rome Nov. 9, 1982; TIAS ____ (entered into force Nov. 13, 1985)("U.S.-Italy Treaty"); U.S.-Morocco Convention on Mutual Assistance in Criminal Matters, signed at Rabat October 10, 1983, ratification advised by the Senate June 28, 1984 and instrument of ratification signed by the President July 13, 1984 (not yet ratified by Morocco)("U.S.-Morocco Treaty"); U.S.-Canada Treaty on Mutual Assistance in Criminal Matters, signed at Quebec City March 19, 1985 ("U.S.-Canada Treaty"); and U.S.-Thailand Treaty on Mutual Assistance Treaty, signed at Bangkok March 19, 1986 ("U.S.-Thai Treaty"). See also U.S.-Bahamas Treaty on Mutual Assistance in Criminal Matters, signed at Nassau by the Bahamas on June 12, 1987, and by the United States on August 18, 1987; U.S.-Mexico Treaty on Cooperation for Mutual Legal Assistance, signed at Mexico City December 9, 1987; and U.S- Belgium Treaty on Mutual Legal Assistance in Criminal Matters, signed at Washington January 28, 1988. See, generally, Ellis and Pisani, United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 Int'l Lawyer 189 (1985).

Article 1 – Obligation to Assist

The first article of the treaty provides for assistance in all matters involving the investigation, prosecution, and suppression of "criminal offenses." The term "suppression" is used since the treaty could be invoked in matters where no criminal prosecution or investigation is underway, such as a civil forfeiture proceeding involving assets acquired through a criminal offense covered by the treaty. Since the precise scope of the obligation set out in this paragraph is affected by the meaning of the terms "offenses" and "proceedings," these terms are carefully defined in detail in Article 2 of the Treaty.

The second paragraph of the article lists the major types of assistance specifically considered by the negotiators of the treaty. Each of the items listed in the second paragraph is the subject of an article later in the treaty which describes in detail the procedure and conditions for that kind of assistance. Thus, the second paragraph serves as something of a "table of contents" to much of the remainder of the treaty. This list of types of assistance, however, is not intended to be exclusive, as indicated by the word "include" in the opening clause of the paragraph.

The third paragraph provides that the treaty is solely a statement of the rights and obligations between the Government of the United States and the Government of the Commonwealth of the Bahamas, and that the treaty is not intended to be utilized by nongovernmental entities in either State. Thus, private parties may not invoke the treaty in order to obtain evidence from the other country for use in solely private matters. Both negotiating delegations agreed that the purpose of this treaty is to enhance the effectiveness of criminal law enforcement authorities, not provide alternative methods of evidence gathering for others, such as litigants in civil matters. In this regard, it is anticipated that any efforts by civil litigants to obtain evidence from the Bahamas for use in noncriminal cases will continue to be made by letters rogatory.[2]

The fourth paragraph provides that all requests shall be executed "in accordance with and subject to the limitations of the laws of the Requested State." The delegations made it clear that the purpose of this provision is to recognize the limitations of the Bahamian constitution but the Bahamians understand the treaty to also be subject to limitations of domestic law. Nonetheless, the Bahamians assured the United States delegation that

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[2] See Article 18(1) of the treaty, which specifically provides that the treaty does not affect or disturb other methods of international assistance.

they intend to enact implementing legislation which will not reduce or limit the scope of aid provided for in the treaty. [3] Indeed, under Bahamian jurisprudence the implementation of some parts of the treaty requires legislation, and both parties understand that some portions of the treaty cannot be utilized unless and until this legislation is in place.

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[3] Requests to the Bahamas for evidence needed in foreign countries (including the United States) are currently executed under the Foreign Tribunals Evidence Act 1856, 19 & 20 Vict., c. 113.

Article 2 -- Definitions

Article 2 defines the terms "offenses" and proceedings" as used in the treaty. The definitions of these terms clarify the scope of the obligation to assist and hence of the treaty itself.

The first paragraph of Article 2 states that "offenses" include all conduct punishable as a crime under the laws of both the Requesting and Requested state. Extradition treaties frequently condition the surrender of fugitive criminals on a showing of "double criminality," and it is the intention of the parties that this paragraph be interpreted in much the same manner as an extradition treaty provision. In extradition cases "double criminality" can exist even when both countries call the crime with different terminology, or place the offense in a different category, or punish it by the different punishment. The rule "does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of liability shall be coextensive, or in other respects the same..."[4] The test is whether the conduct which the accused is believed to have committed in the requesting state would constitute some criminal offense if committed in the requested state.[5] Thus, the double criminality test, properly applied, would permit assistance in a United States investigation in connection with many United States offenses which appear not to have exact Bahamian statutory counterparts. The Parties are to give a liberal interpretation to Article 2(1) in order to give assistance in as many cases as possible.

One common problem in this area was specifically discussed during the negotiations. Certain United States federal offenses are described in statutes which call for proof of certain elements (inter alia, use of the mails or interference with interstate commerce) to establish jurisdiction in the federal courts. Foreign judges know of no similar requirement in their own criminal law (since few countries have the kind of federal system we do), and on occasion have denied extradition of fugitives on this basis. Both delegations agreed that this problem is eliminated under this treaty, since it is understood

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[4] Collins v Loisel, 259 US 309, 312 (1922). Accord, Cucuzzella v Keliikoa, 638 F 2d 105, 108 (9th Cir. 1981).

[5] Reg. v Governor of Holloway Prison, ex Parte Jennings, [1983] 1 A.C. 624; United States v McCaffery, [1984]; R v Governor of Pentonville Prison, ex Parte Budlong and another, [1980] 1 All E.R. 701; Shapira v. Ferrandina, 478 F.2d 894 (2nd Cir. 1973).

that the Requested State will disregard elements of an offense required solely for the purpose of establishing U.S. jurisdiction[6] and will not be misled by mere differences in terminology used in defining the offense under the laws of each country.

Because Bahamian and United States laws differ significantly in some respects, strict adherence to the double criminality rule alone might render assistance unavailable to the Requesting State in many significant areas in which no public policy in the Requested State would call for such a restriction. Therefore, in order to accommodate each country's investigatory needs, the treaty permits assistance to be granted in five specific areas without regard to double criminality. For crimes which falls within these categories, it is enough that the conduct under investigation be conduct which " arises from, relates to, results from, or otherwise involves" a crime punishable by more than one year's imprisonment in the Requesting State alone. The phrase "arises from, relates to, results from, or otherwise involves" is intentionally broad. It includes crimes such as attempting or conspiring to commit an offense on the list as well as actually committing such an offense. The phrase also includes racketeering charges which rely upon a listed offense as a predicate offense, or tax crimes involving funds acquired through the commission of a listed offense, provided the conditions of Article 2(2) are met. In other words, the phrase is broad enough to include crimes closely connected to listed offenses.

The first paragraph of the article lists the categories of offenses covered:

> "1. Crimes relating to illegal narcotics trafficking. The traffic in drugs is a serious problem to both countries, and it is intended that this treaty will be a valuable tool to enhance investigations aimed at halting these offenses. Both the United States and the Bahamas are parties to the Single Conventionon Narcotic Drugs, 1961 and the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, which oblige the signatories to provide assistance to each other in narcotics investigations. The obligation undertaken here is consistent with that set out in these multilateral conventions, since neither the Single Convention or the Amending Protocol conditions the obligation to provide assistance on double criminality;
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> 2. Theft, including obtaining by false pretenses, and embezzlement;

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[6]See Government of the United States of America and others v. McCaffery, supra note 5.

3. Crimes of violence, such as bank robbery, extortion, or terrorism-related crimes;

4. Fraud of various kinds, including fraud upon the government. This subparagraph would include mail or wire fraud, most securities laws violations involving fraud or fraudulently obtained profits. The Bahamian delegation assured the United States delegation that the wording of the subparagraph would cover most United States offenses involving the operators of large scale tax shelter frauds, subject of course to the limitations spelled out in Article 2(2);[7] however, the subparagraph would not include the "run of the mill" tax evasion case, in which there is no individual victim; and

5. Violations of the laws involving currency or other financial transactions which contributed as an integral element to the commission of one of the crimes described above. This subparagraph should cover most violations of Title 31, United States Code, and is focussed on crimes involving money laundering or other violations of the currency or financial transaction reporting laws which contribute to drug trafficking or other offenses.

The second paragraph of the article, like Article 3(1) of the U.S.-Cayman Treaty, permits denial of assistance when the matter is one which relates directly or indirectly to the regulation of taxes, including the imposition, calculation, and collection of taxes. The subparagraph specifically notes that exceptions to this restriction exist where the money involved in the tax matter were derived from any activity covered by Article 2(1)(a) or 2(1)(b). For example, a criminal tax prosecution in the United States involving unreported income acquired through illegal drug trafficking could qualify as an offense for which assistance could be provided under the treaty.

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[7] These, of course, are the case in which gullible victims are persuaded by the conmen to pay money for "investments" which are advertised as having been structured to result in the victims' avoiding or substantially reducing his federal income tax. Then the offenders often simply pocket the money, and provide the victim with fraudulent documents purporting to reflect the investment. Since the Internal Revenue Service usually disallows any tax benefits based on participation in the scheme, the victim actually loses twice -- he loses the money he paid to the tax shelter promoter to invest on his behalf, and he also fails to obtain the tax benefits he paid for.

Article 2(3) defines the kinds of proceedings in aid of which treaty requests can be made.

The first subparagraph states that criminal trials in either country may be the basis for requests for assistance.

The second subparagraph states that United States grand jury proceedings can be the basis of requests. This provision is important because under present law there is some question whether letters rogatory or other requests for assistance can be honored under the Foreign Tribunal's Evidence Act 1856 if the request is in aid of a grand jury investigation in the United States.[8] The corresponding legal process in the Bahamas is called a preliminary inquiry, and the same subparagraph specifies that these too can be the basis of treaty requests. While no United States court has ever refused assistance to the Bahamas in connection with a preliminary inquiry, there are cases in which United States courts have refused to honor requests from the Bahamas in connection with a commissions of inquiry, a somewhat different kind of proceeding in that country which has no clear counterpart in United States jurisprudence.[9] Since the efforts of commissions of inquiry can make a valuable contribution to effective law enforcement, it was agreed that the provisions of the treaty should be available to assist such commissions in their work.

Article 2(3)(c) states that the treaty will be available in cases involving the forfeiture of the fruits or instrumentalities of drug trafficking. This is fully consistent with the provisions of Article 14 of the treaty, which is discussed in more detail below.

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[8]The Act contains no specific limitation on assistance in grand jury matters, but a British court decision involving a subsequent statute, The Foreign Evidence (Tribunals) Act 1975, has cast doubt on the ability of a court to lawfully execute a request from a United States grand jury. Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. (1978) 1 All E.R. 434, per Lord Diplock (H.L.)

[9] In the Matter of the Request for Judicial Assistance from the Supreme court of the Commonwealth of the Bahamas, Misc. No. 84-0113 (D. D. C., application denied June 5, 1984). The decision in this case was based on cases holding that Title 28, United States Code, Section 1782 permits assistance to be accorded only to tribunals performing "adjudicatory" functions in the requesting state. See, e.g., In Re Letters Rogatory from the Court of Queen's Bench for Manitoba, Canada, 488 F.2d 511 (9th Cir. 1973).

Just as commissions of inquiry have no counterpart in United States law, Bahamian jurisprudence lacks some of the civil or administrative proceedings which could impose sanctions on an offender in connection with a criminal matter in the United States. For instance, the Securities and Exchange Commission can order a securities trader to disgorge unlawfully obtained profits, or surrender stock obtained in violation of the law; the Commodities Futures Trading Commission can bar a trader from the United States commodities market; and any United States court could order restitution to the victims of an offense. The United States believes that the imposition of sanctions of this kind can be just as important in deterring unlawful activities as a referral of a matter to the Justice Department for criminal prosecution. Therefore, the treaty will be a more effective adjunct to criminal law enforcement if it can be brought to bear in civil and administrative proceedings of this kind. However, the Bahamian delegation felt that the procedures employed in at least some of these proceedings were incompatible with Bahamian notions of due process. Therefore, Articles 2(2)(d) and 2(2)(e) permit the Attorney General of the Bahamas, in his discretion, to apply the treaty in connection with a request for assistance in aid of proceedings of this kind.

Article 3 -- Limitations on Compliance

Article 3(1) specifies classes of cases in which assistance may be refused under the treaty.

Article 3(1)(a) permits assistance to be refused if the assistance would prejudice the security or "essential public interests" of the Requested State. The United States intends to interpret this provision sparingly, and views "essential public interests" as those ancillary to national security. However, the Bahamian delegation made it clear that in its view the phrase could include essential interests unrelated to national military or political security, and that it plans to look to the English common law jurisprudence on "public order" in interpreting the phrase. It is clearly understood that "public interest" is not to be interpreted in a manner to convert the treaty's mandatory provisions into discretionary ones.

Article 3(1)(b) permits the Central Authority of the Requested State to deny a request if it relates to a political offense or a purely military offense. These restrictions are similar to those found in other mutual legal assistance treaties.

Article 3(1)(c) was requested by the Bahamian delegation, and is derived from Article 7(1)(d) of draft uniform legislation regarding mutual legal assistance among the Commonwealth countries.[10] It permits the Requested State to deny a request if the evidence requested is to be used to try a person in the Requesting State on a charge for which that person has already been acquitted or convicted in that State, or a charge for which the person was in jeopardy of being convicted, as jeopardy is defined in the law of the Requesting State. The Bahamian delegation observed that there could be occasions on which it would be inconsistent with Bahamian constitutional traditions to assist foreign authorities in a prosecution which would be barred under their own law.

Article 3(1)(d), similarly requested by the Bahamian delegation, was also inspired by a provision in the Commonwealth Scheme.[11] It permits a

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[10] Article 7(1)(d), The Final Scheme Relating to Mutual Assistance in Criminal Matters Within the Commonwealth As Agreed by Senior Officials and Recommended to the Law Ministers for Adoption, done at London February 7, 1986 (hereinafter "the Commonwealth Scheme").

[11] See Article 7(2)(b) of the Commonwealth Scheme, supra, note 10.

request to be denied if the Central Authority determines that there are substantial grounds for believing that granting the assistance would facilitate the prosecution or punishment of the person identified in the request on account of his race, religion, nationality, or political opinions.[12] The United States delegation understood the term "on account of" to limit the application of this provision to cases in which the race, religion, or political opinion of the offender is the governing motive for the prosecution, as opposed to the desire to punish criminal offenses. Where a particular request to the United States appears to be covered by this provision, the Attorney General will ask the Department of State to determine whether the request should be denied on this basis.

Article 3(1)(e) is based on Article 3(2)(c) of the U.S.-Cayman Treaty, and permits the Central Authority of the Requested State to deny a request if it finds that the request fails to contain reasonable grounds to believe that a crime was committed, or that the information sought in the request is not relevant to that crime, or that the requested information is not in the territory of the Requested State. The phrase "reasonable grounds to believe" is not the equivalent of a prima facie case, and it is not intended to require either party to prove the guilt of the suspects beyond a reasonable doubt. Since many requests will be made at the investigative stage, it is unreasonable to oblige the Requesting State to prove a prima facie case before the evidence has been assembled against the suspects. The phrase "reasonable grounds to believe" is also not the exact equivalent of the "probable cause" requirement in United States law for the issuance of a search or arrest warrant. Rather, the phrase was intended to require only that each State to support each request with a precise, rational explanation for its belief that a crime covered by the treaty has occurred or will occur, usually involving the description of the facts indicating the offense has occurred, and to set forth the justification for seeking the evidence. This provision thereby assures the Requested Party that the request is not a "fishing expedition." It is anticipated that neither party will allow challenges to the credibility of statements in the request, nor demand that the Requesting State supply "evidence" to support the request. Instead, the Central Authority of the Requested State has the discretion to reject a request if it is convinced that the information in the request (which is presumed to be true) fails to make out a case for the production of evidence.

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[12] Article 7(2)(b) of the Commonwealth Scheme also permits assistance to be denied if the Central Authority concludes that the person would be "prejudiced" in his trial or detention on these grounds, but this additional basis for rejecting a request was deemed far too broad to include in this bilateral treaty.

Finally, Article 3(1)(f) permits the Central Authority to deny assistance if the request does not conform to the treaty. This would include requests which fail to contain all of the requisite information.

Article 3(2) is similar to paragraph 3(2) of the US-Swiss Treaty, and permits the Requested State to impose appropriate conditions on its assistance in lieu of denying a request outright. For example, a State might request information which could be used either in a routine criminal case (which would be within the scope of the treaty) or in a political prosecution (which would fall outside the treaty). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. It is anticipated that the Requested State would notify the Requesting State of proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If it does accept the evidence, it must respect the conditions specified by the Requested State with respect to the evidence.

Article 3(3) states that a request for assistance need not be executed immediately where execution would interfere with an investigation or legal proceeding in the progress in the Requested State. The Central Authority of the Requested State will determine when to apply this provision. The Central Authority of Requested State may, in its discretion, take such preliminary action as it deems advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that State. If this is done, the Requesting State should not be seriously disadvantaged by having to wait until the conclusion of the proceedings in the Requested State.

Article 3(4) effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the reason for denying or postponing execution of the request, thus assuring that when a request is refused or only partly executed the Requested State will provide some explanation for not providing all of the information or evidence sought . This will eliminate misunderstandings which can arise in the operation of the agreement, and enable the Requesting State to better prepare its requests in the future.

Article 4 -- Central Authorities

Article 4 of the treaty provides that each party shall designate a "Central Authority." The United States Central Authority would make requests to the Bahamas on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States, and the Bahamas' Central Authority will make all requests emanating from the authorities there. It is understood that some discretion will be exercised by the Central Authority of the Requesting State as to the form and content of requests, and as to the number and priority of requests. The Central Authority of the Requested State is responsible for receiving each request from the other, transmitting it to appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Article 4(2) provides that the Attorney General will be the Central Authority for the United States, as is the case under all United States mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. § 0.64-1.[13] Article 4(3) states that the Attorney General of the Bahamas will serve as the Central Authority for the Bahamas.

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[13]The Assistant Attorney General for the Criminal Division has in turn redelegated his authority to the Deputy Assistant Attorneys General and to Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, December 6, 1983.

The Bahamian delegation informed the United States delegation that the Central Authority of the Bahamas would not honor a request from a delegate of the United States Attorney General unless the United States Attorney General informed his counterpart in writing of the name and title of the individual who will be acting in the United States Attorney General's stead under the treaty. This notification, when issued, will remain in effect for all subsequent requests until further notification.

Article 5 -- Contents of Requests for Mutual Assistance

This article is similar to Article 29 of the U.S.-Swiss Treaty, which, in turn, is based on Article 14 of the European Convention on Mutual Assistance in Criminal Matters.

The first paragraph requires that requests be made in writing if compulsory process -- judicial subpoenas, search warrants, or the like -- are necessary for execution, or if the Requested State has indicated that a written request is necessary. In an emergency, an oral request could be made, but it must be confirmed in writing "forthwith." It is anticipated that "forthwith" will mean within seven to ten days, but this is best left to development of practice between the Central Authorities.

Article 5(2) lists information which is deemed crucial to efficient operation of the agreement, and so must be included in each request. Article 5(3) outlines kinds of information which should be provided " to the extent necessary and possible." In keeping with the intention of the parties that requests be as simple and straightforward as possible, there is no requirement under the treaty that a request be legalized or certified in any particular manner.

Article 6 – Execution of the Request

The first paragraph of Article 6 requires each party to promptly undertake diligent efforts to execute a request. The Central Authority which receives a request will first review the request and immediately notify the Central Authority of the Requesting State if it is of the opinion that the request does not comply with the treaty's terms. If the request does satisfy the treaty's requirements and the assistance sought can be provided by the Central Authority itself, the request will be fulfilled without delay. It the request meets treaty's requirements but its execution requires action by some other agency in the Requested State, the Central Authority will see to it that the request is promptly transmitted to the correct agency for execution. Where the United States is the Requested State, it is anticipated that most requests will be transmitted to federal investigators, prosecutors, or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Central Authority deems it more appropriate to do so.

The first paragraph also authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to take whatever action would be necessary and within its power to execute the request. This provision does not authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from the Bahamas. Rather, it is anticipated that when a request from the Bahamas requires compulsory process for execution, the Department of Justice would ask a federal court to issue the necessary process or court order under 28 U.S.C. § 1782 and this treaty.

If execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested State shall arrange for the presentation of the request to that court or agency at no cost to the other Party. Since the cost of retaining foreign counsel to present and process letters rogatory requests abroad is sometimes quite high, this provision for reciprocal legal representation should be a significant advance in bilateral legal cooperation. Should the Requesting State choose to hire private counsel in connection with a particular request, it is free to do so.

Article 7 -- Costs

Article 7 proceeds from the basic premise that the Requesting State should bear all expenses incurred in the execution of the request except for the costs of the presentation of its request to the appropriate authorities in Requested State, which is provided at no cost pursuant to Article 6, and the ordinary expenses (such as filing fees and the like) connected with legal proceedings in the Requested State.

The negotiators specifically addressed one recurring problem in this area: the cost of legal representation of witnesses. When United States authorities serve a subpoena in the United States to obtain testimony from an individual or institution here, the recipient of the subpoena is ordinarily entitled to no more than a modest stipend or "witness fee."[14] Of course, the witness is free to seek advice of legal counsel with respect to whether and how to respond. However, the witness has no constitutional or statutory right to call upon the United States Government to pay for such legal consultation.[15] A similar situation obtains with respect to witnesses summoned to testify by the government in Bahamian criminal proceedings.

On the other hand, the United States has occasionally asked individuals or institutions abroad to cooperate with one of our criminal investigations, and been told by the witness that the bank or business secrecy laws of the witness' country bar him from doing so unless certain steps are taken (such as obtaining the consent of the client or permission from the local courts). The United States routinely agrees to assist the witness in any appropriate way short of paying for legal fees associated with the application

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[14] For example, under federal law a witness is currently entitled to $30 a day witness fee and up to $75 a day "subsistence." 28 U.S.C. § 1821.

[15] If the witness is a banking institution, under some circumstances it may be entitled to reimbursement for some of the costs of producing records, pursuant to the Right to Financial Privacy Act. See 12 USC § 3415. However, expenses recoverable under the Act are limited to the costs of searching for, reproducing, and transporting documents to the grand jury; the regulations implementing the Right to Financial Privacy Act specifically exclude reimbursement by the government fees of paid by the institution for "managerial or legal advice." 12 CFR § 219.3. Of course, the witness/ institution has no right to reimbursement if it is itself the subject of the investigation. In Re Grand Jury Proceedings, 636 F.2d 81 (5th Cir. 1981).

for consent.

The United States delegation was concerned that when the United States makes a request to another country for evidence through letters rogatory, and the courts in that country summon the individual or institution to provide the evidence, the witness sometimes insists that the United States should pay for consultation with counsel in connection with the summons. Both delegations agreed that it is unfair to call upon the Requesting State to routinely pay the legal expenses of witnesses responding to the Requested State's compulsory process issued pursuant to requests under this treaty. Where the witness is responding to a command from the court in his own country (rather than a request from a foreign government) to produce evidence or provide testimony, the role (if any)[16] of witness counsel and payment of such counsel should be governed by the same rules which would apply in any other proceeding before that court. The fact that the local court's command is issued in aid of a foreign prosecution should not oblige the foreign government to pay expenses not ordinarily incurred in similar proceedings in the Requested State. Witnesses subpoenaed in the United States in connection with a foreign country's letters rogatory under 28 U.S.C. § 1782 do not receive reimbursement for the costs of counsel, and neither the United States Government nor any partners to the mutual legal assistance treaties now in force have ever suggested that the Requesting State bear such costs in connection with a treaty request. Based on these considerations, the treaty provides that witness fees are not a cost for which the Requesting State is responsible under subsection 7(1) or 7(2). The language of Article 7 is intended to make it clear that the Requesting State does not bear an obligation to finance the legal consultations, while leaving the flexibility for that State to agree, on a case by case basis, to pay for "extraordinary expenses" -- the costs of legal representation -- in situations where it is especially just and appropriate, i.e., the witness is an individual who may himself be somehow involved in our investigation.

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[16]For an example of the kind of difficulties which can be encountered when counsel for witnesses are involved, see Reg. v. Rathbone, Ex p. Dikko, [1985] 2 W.L.R. 375.

Article 8 -- Limitations on Use

Article 5 (2)(b) states that the Requesting State must specify in the request the reason why the information or evidence sought under the treaty is needed. Accordingly, the first paragraph of Article 8 requires that information provided under the treaty will not be used for any purpose other than that stated in the request without the consent of the Central Authority of the Requested State.

The second paragraph requires the Requested State keep the evidence confidential unless otherwise agreed except to the extent necessary for investigations or proceedings forming part of the prosecution of the criminal offense described in the request. The latter exception is included because there is some question whether the Sixth Amendment to the United States Constitution would permit the United States to honor a confidentiality requirement imposed by the Bahamas on evidence which may be favorable to the accused.[17] Moreover, the purpose of the treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State can disclose evidence to the Requesting State but impose confidentiality restrictions which prevent the Requesting State from using that evidence.

Once information obtained under the treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Central Authority of the Requesting State to continue to block the use of that information by third parties or other government agencies. Therefore, some United States mutual legal assistance treaties permit evidence obtained under the treaty to be used for any purpose after it has become public in a trial resulting from the proceedings described in the request.[18] The negotiators of this treaty recognized this fact, but the Bahamian Government preferred to follow the approach taken by the U.S.-Cayman Treaty, and insisted that public revelation of information obtained under the treaty, in and of itself, should not justify the Requesting State's use

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[17] See Brady v. Maryland, 373 U.S. 83 (1963).

[18] See U.S. -Canada Treaty Article 11(3). The U.S. Netherlands and U.S.-Colombian treaties have no specific provision on the point, but the topic was discussed and agreed to by the negotiators.

of the information for purposes inconsistent with Article 8(1). Therefore, Article 8(4) states that once evidence obtained under the treaty has been made public in a proceeding forming part of the request, the evidence may be used if one of three exceptions apply.

First, under Article 8(4) (a), the evidence can be used for any purpose against persons who were convicted in a criminal trial for an offense covered by the treaty. For example, if evidence is provided under the treaty in connection with a criminal trial for securities fraud, and the defendant is convicted of the offense, the evidence could be used by other governmental authorities -- including tax authorities -- against the convicted person for any purpose, including assessing and collecting taxes due on the fraudulently obtained funds.

Second, Article 8(4)(b) states that the evidence can be used without restriction for any criminal prosecution of a person for offenses falling within the treaty. This paragraph applies regardless of whether the Requesting Party secured a conviction of the person who was the defendant in the case upon which the initial request was based. For instance, if evidence is provided under the treaty for use in a criminal trial of Mr. A on securities fraud charges, and the evidence reveals that Mr. B also participated in the crime, the evidence may be freely used to prosecute Mr. B even if Mr. A is acquitted at trial. Similarly, if evidence were obtained in connection with one treaty offense (such as fraud), and the evidence discloses the commission of another treaty offense (such as a murder), the evidence could be used by the Requesting Party in a prosecution for that second treaty offense without violating this article, even if no prosecution ever took place for the crime on which the initial request was based.

Finally, Article 8(4)(c) authorizes the use of the evidence in civil or administrative proceedings related to the recovery of the unlawful proceeds of a criminal offense covered by the treaty from a person who has knowingly received them. The evidence may also be used in in collecting tax or enforcing tax penalties resulting from knowingly receiving the proceeds of an offense covered by the treaty, or in forfeiture to the government of the unlawful proceeds or instrumentalities of such an offense. This is consistent with Article 15(2) of the treaty, which obliges the parties to assist one another in the forfeiture of criminally obtained assets, in securing restitution to the victims of crimes, and in the enforcement of sentences involving fines.

Under Article 18(3), the restrictions outlined in Article 8 are for the benefit of the parties to the treaty -- the United States and Bahamian Governments -- and the enforcement of these provisions is left entirely to the parties. Where any individual alleges that an authority in the United States is seeking to use information or evidence obtained from the Bahamas in a manner inconsistent with this article, the recourse would be for the person to

inform the Central Authority of the Bahamas of the allegations, for consideration only as matter between the governments. If either of the parties believe that the allegations require explanation, it may make an appropriate inquiry.

Article 9 -- Testimony in the Requested State

Paragraph 1 of Article 9 states that the Requested State may compel[19] a person within its jurisdiction to testify or produce documents or articles needed as evidence in the Requesting State. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of that party.

The compulsion contemplated by this article can be accomplished by subpoena (if the Requested State's law so provides) or any other means available under the law of that country. During the negotiations, both delegations understood that this provision, read together with Article 1(4), means that the procedure for executing a request under the treaty would have to be one which conforms to the laws of the Requested State. It should be stressed that it is the treaty that determines <u>whether</u> assistance is required, and local law should govern the very different (if equally important) question of <u>how</u> the assistance is provided.

Both delegations agreed that this article, read together with Article 1(5), insures that no person would be compelled to furnish information if he has a right not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a treaty request from the Bahamas is guaranteed the right to invoke any of the testimonial privileges (such as attorney client privilege, interspousal privilege, etc.) usually available in proceedings here, as well as the constitutional privilege against incrimination.[20] Of course, a witness testifying in the Bahamas may raise any

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[19] The use of the word "may" appears at first glance to make the obligation to execute a request for testimony discretionary. However, the word "may" was used in the treaty in order to make it clear that compulsory process is not required in every case. For instance, a witness may be perfectly willing to provide the needed testimony voluntarily, and the negotiators were concerned that using the word "shall" instead of "may" might appear to oblige the Requested State to issue a subpoena or other compulsory process even if it were not necessary. The United States and Bahamian delegations fully intended that the treaty establish a mandatory obligation to arrange the production of the requested testimony, leaving it to the Requested State's discretion whether or not to use compulsory judicial process to fulfill that obligation.

[20] This is consistent with 28 USC 1782.

of the similar privileges available under Bahamian law.

Since the law is unclear on the extent to which a person in one country may stand on a privilege available only under the law of a foreign country, the treaty neither requires nor forbids the recognition in the Requested State of privileges existing only in the Requesting State. Article 9(2) does require that in cases in which a witness attempts to assert a privilege which does not exist under the law in the Requested State, the authorities in the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting State, where the scope of the privilege and the legislative and policy reasons underlying it are best understood.[21] A similar provision appears in many of our recent mutual legal assistance treaties.

The third and fourth paragraphs provide that all interested parties, including the defendant and his counsel in criminal cases, may be permitted to be present and, subject to the laws of the Requested State, shall be allowed to pose questions during the taking of testimony under this article.

Article 9(5) states that business records produced pursuant to the treaty may be authenticated by having a custodian of the records or other qualified person complete, under oath, a certification in a specified form. A model of the form is appended to the treaty. Thus, the provision establishes a procedure for authenticating foreign records in a manner essentially similar to that followed in Title 18, United States Code, § 3505.[22]

Article 10 -- Transferring Persons in Custody for Testimonial Purposes

In some recent criminal cases, a need has arisen for the testimony of at trial of a witness serving a sentence in another country. In some instances, the country involved was willing and able to "lend" the witness to the United States Government, provided the witness would be carefully guarded while here and returned at the conclusion of his testimony.

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[21] Cf. R. & I. Dick Co. v. Bass, 295 F.Supp.. 758 (N.D. Ga. 1966); Reg. v Rathbone, Ex p. Dikko [1985] 2 W.L.R. 375.

[22] See also Section 29(c) of the Canada Evidence Act. It is understood that the last sentence of the article provides for the admissibility of authenticated documents evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

In one or two recent cases, the United States Government was able to arrange for federal inmates here to be transported to foreign countries to assist in criminal proceedings there.[23] Paragraph 1 of Article 10 calls for mutual assistance in situations of this kind, and thereby provides a legal basis for cooperation in these matters. The paragraph is based on Article 26 of the U.S.-Swiss Treaty, which is in turn based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.

There have also been recent situations in which a person in custody in the United States in a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case.[24] The second paragraph of the article addresses this situation.

The article's third paragraph provides express authority for the receiving State to maintain the person in custody throughout his stay there, unless the other State specifically authorizes release. The paragraph also authorizes the receiving State to return the person in custody to the other State, and provides that this return will occur as soon as circumstances permit, or as otherwise agreed, but in no event later than the date on which the person would expect to be released from custody in the State from which he was transferred. The transfer of a prisoner under this article requires the consent of the person involved and of both countries, but the provision does not require the prisoner to consent again to his return to the State where the transfer began.

Once the receiving State has agreed to assist the sending State's investigation or proceeding pursuant to this Article, it would be inappropriate for the receiving State to hold the person transferred and require full-dress extradition proceedings before allowing him to return to the sending State as agreed. Therefore, the paragraph states that extradition proceedings will not be required before the return of the person transferred.

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[23] For example, on January 23, 1986, federal prisoner Edward Hayes Ward was temporarily released from the federal Correctional Institution at Talladega, Florida, to travel to Nassau, the Bahamas, and testify for the Government there at a preliminary inquiry in the case of Commissioner of Police v. George Smith and Everette Bannister, Case No. 4948-85. Ward was accompanied by DEA agents, who saw to his security and insured his prompt return to the United States custody when his testimony was no longer needed.

[24] See United States v. King, 552 F. 2d 833 (9th Cir. 1976), where the defendants insisted on travelling to Japan to be present at the deposition of certain witnesses in prison there.

Article 11 – Testimony in the Requesting State

This article provides that upon request the Requested State shall invite witnesses who are located in its territory and needed in the Requesting State to travel to the Requesting State to testify there if at all possible. Of course, the Requesting State would be expected to pay the expenses of such an appearance, and the treaty provides that the witness shall be informed of that fact, and of the amount and kind of allowances and expenses which the Requesting State will provide in a particular case. This information should be specified by the Requesting State in its request, pursuant to Article 5(3)(e). An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness.

Article 12 -- Safe Conduct

This article, like Article 27 of the US-Swiss Treaty, provides that a person who is in the Requesting State to testify or for confrontation purposes under the treaty shall be immune from criminal prosecution, detention, or any restriction on personal liberty, or from the service of process in civil suit while he is in the Requesting State. This "safe conduct" is limited to acts or convictions which preceded the witness' departure from the Requested State. This provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

The article's applicability to a person transferred under Article 10 is necessarily limited, since Article 10 requires that the witness be kept in custody unless the State from which he was transferred consents to his release.

The second paragraph states that the safe conduct guaranteed in this article expires ten days after the person has been officially notified that his presence is no longer required, or if he leaves the Requesting State and thereafter returns to it.

Article 13 -- Providing Records of Government Agencies

Article 13 serves to insure speedy access to government records including executive, judicial, and legislative units at the federal, state, and local levels in either country. The kinds of government information which will be most commonly sought from the Bahamas will include records from the Registrar of Companies, the records of convictions in Bahamian courts, or documents from the files of the police or other investigative authorities. Bahamian requests to United States for government documents are expected to fall generally in the same categories.

The first paragraph obliges each party to furnish to the other copies of publicly available records of a government agency. The term "government agency" includes executive, judicial, and legislative units at the federal, state, and local level in either country.

The second paragraph provides that the Requested State "may" share with its treaty partner copies of nonpublic information in government files. The article states that the Requested State may only utilize its discretionary authority to turn over information in its files "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. It is the intention of the negotiators that the Central Authority of the Requested State determine what that extent and what those conditions would be. This provision was made discretionary because government files in each State contain some information which would be available to investigative authorities in that State, but which would justifiably be deemed inappropriate to release to a foreign government. Examples of instances in which assistance might be denied under this provision would be where disclosure of the information is barred by law in the Requested State or where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information which was made available to the Requested State in return for a promise that it not be divulged to anyone.

The third paragraph states that documents provided under this Article will be authenticated pursuant to a certificate in a form appended to the treaty. Thus, the documents will be authenticated in a method similar to that required by Rule 902(3), Federal Rules of Evidence, and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,[25] and will be admissible into evidence without additional

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[25]Done at the Hague October 5, 1961, entered into force for the United States October 15, 1981 (T.I.A.S. 10072, 527 UNTS 189). The Bahamas is not yet a

foundation or authentication.

The article refers to the provision copies of government records, but the negotiators agreed that the Requested State would not be precluded from delivering the original of the government records to the Requesting State, upon request, if the law in the Requested State permits it and where it is essential to do so.

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party to this agreement.

Article 14 -- Assisting in Forfeiture Proceedings

A primary goal of the treaty is to enhance the efforts of both States in the war against narcotics trafficking. One major strategy in that drug enforcement efforts by United States authorities to seize and confiscate the money, property, and other proceeds of drug trafficking. Article 14 , which is similar to Article 17 of the U.S.-Canada Treaty and Article 15 of the U.S.-Thai Treaty, is designed to further that strategy.

The first paragraph authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of fruits or instrumentalities of a serious offense such as drug trafficking. The term "fruits and instrumentalities" would include things such as money, vessels, or other valuables either being used in the crime or which were purchased or obtained as a result of the offense.

Upon receipt of notice under this article, the Central Authority of the State in which the objects are located may take whatever action is appropriate under the law of the state. For instance, if the assets in question are located in the United State and are the fruit of a fraud in the Bahamas, they could be seized in aid of a prosecution under 18 U.S.C. § 2314, or in anticipation of a civil action for the return of the assets to the lawful owner. If the assets are located in the Bahamas, it is expected that similar action could be taken pursuant to Bahamian law. [26]

Recently enacted legislation in the United States expands the authority of law enforcement officials to seize the proceeds of drug trafficking. Part of the new law -- Title 18, United States Code, Section 981(a)(1)(B) (1986)-- also allows the forfeiture to the United States of property "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a Controlled Substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." The United States delegation expects that Article 14 of the treaty will permit full

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[26] We understand that under some circumstances the common law does permit this to be done. See Mareva Compania Naviera SA v International Bulkcarriers SA, [1980] All ER 213; Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274.

implementation of the new legislation.[27]

The second paragraph of Article 14 states that the parties to this treaty may aid one another in proceedings leading to the forfeiture of the proceeds of crime. The traditional rule was that no state is obliged to aid another in the execution of penal laws respecting enforcement of fines or forfeiture of criminal assets. However, this rule is gradually changing, at least where the foreign country's laws are designed to provide redress to individual victims, or where the foreign country has already perfected its title to the assets it claims.[28] Moreover, any country is always free to assume a treaty obligation broader than a customary international obligation. In Article 14(2), the parties to this treaty agree to aid one another, on request, in proceedings leading to the forfeiture of illegally obtained assets, restoring illegally obtained funds or articles to their rightful owners, and the collection of fines imposed as sentences in criminal prosecutions.

Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or enforce a judgement of forfeiture or fine levied in the Requesting State, the treaty requires the Requested State to do so. The article does not mandate institution of forfeiture proceedings in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

The recent United States legislation permits the Government to transfer an equitable share of certain forfeited property to other countries.[29] Under regulations promulgated by the Attorney General, this equitable share

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[27] The United States legislation is consistent with the laws in other States, such as Switzerland and Canada, and the movement among States is toward legislation of this kind for use in drug enforcement. See, e.g., the analysis and text of Article 3 of the United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters, as set out in A Report on the Status of the Draft, the U.S. Negotiating Position, and Issues for the Senate, S. Prt. No. 100-64, 100th Cong., 1st Sess., 6-11, 25-26 (1987).

[28] See, e.g., Mutual Assistance in Criminal Matters: A Commonwealth Perspective, prepared by Dr. David Chaikin and Commonwealth Secretariat for the meeting of Commonwealth Law Ministers, Colombo, Sri Lanka, February 14-18, 1985, at pages 32-34.

[29] 18 U.S.C. § 981(a)(1)(B).

will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The negotiators drafted Article 14 broadly to ensure that it would authorize and provide for the transfers of forfeited assets or the proceeds of such assets to the other party under the new United States law. Article 14 enables either party to transfer forfeited assets to the extent permitted by their respective laws. It is anticipated that the terms of such transfers will be agreed upon through an exchange of diplomatic notes.

Article 15 -- Search and Seizure

It is sometimes in the interests of justice for one State to ask another to search for, secure, and deliver articles or objects needed in the the other State for use as evidence or for other purposes. United States courts can and do execute such requests now under 28 U.S.C. § 1782, [30] and the Bahamian delegation felt that such a request could be carried out under current Bahamian law if made by letters rogatory. Article 15 of the treaty creates a formal framework for handling such a request.

Pursuant to Article 15(1)'s requirement that the request include "information justifying such action under the laws of the Requested State," a request to the United States from the Bahamas ordinarily will have to be supported by probable cause for the search. A United States request to the Bahamas would have to satisfy the corresponding evidentiary standard there. It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search is being conducted.

Article 15(2) is designed to insure that a record is kept of articles seized and of articles delivered up under the treaty. This provision effectively requires that detailed and reliable information be kept regarding the condition of the article and the chain of custody between the time of seizure and the time of delivery to the Requesting State.

Article 15(2) also requires that the certificates prepared for this purpose will be admissible without additional authentication at trial in the Requesting State and is intended to avoid the burden, expense, and inconvenience to the Requested State of sending its officials to the Requesting State to provide authentication and chain of custody testimony each time evidence produced pursuant to this Article are used. The treaty's injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to accord the certificate only such weight as it is due.

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[30] See e.g., United States Ex rel Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst, Case No 84-67-Misc-018 (M. D. Fla, Orlando Div.) cited in Ellis and Pisani, supra note 1 at page 215.

Article 16-- Location and Identity of Persons

Article 16 provides that the Requested State is to ascertain the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) where such information is of importance in connection with an investigation or proceeding covered by the treaty. While this is a standard provision contained in all of our mutual legal assistance treaties, the negotiators recognized that the obligation encompassed by this article could be especially serious for the Bahamas, which has but modest resources to police over 700 islands scattered across thousands of square mile of ocean. For this reason, the treaty requires only that the Requested State make "best efforts" to locate the person sought by the Requesting State. It is anticipated that the United States will invoke this provision only sparingly, and with an appreciation of the burden which could be imposed on the Bahamian authorities.

Both delegations clearly understood that the obligation to locate persons is limited to persons who are or may be in the territory of the Requested State. Thus, the United States would not be obliged to try and locate United States citizens or others who may be in third countries. In all cases, the Requesting State would be expected to supply such information as may be available about the last known location of the person sought.

Article 17 -- Serving Documents

Article 17 creates an obligation on the part of the Central Authority of the Requested State to arrange for or effect the service of summons, complaints, subpoenas, or other legal documents at the request of the Central Authority of the other State.

It is expected that when the United States is the Requested State, service will be made by registered mail (in the absence of any request by the Bahamas to follow any specified procedure for service) and by the United States Marshal's Service in instances where personal service is requested.

It is anticipated that this article will facilitate service of subpoena on United States citizens, pursuant to Title 28, § 1783. However, the Bahamian authorities insisted that the first paragraph of the article not oblige the Requested State to serve any subpoena which requires the attendance of a person in the Requested State at a proceeding before an authority or tribunal in the Requesting State where serving such subpoena would be impractical due to the location of the person. Again, the Bahamian authorities were concerned that their modest resources would be severely taxed by efforts to effect such service at remote locations in the Bahamas. It is anticipated that where service is practical -- i.e., where the person is located in a metropolitan area -- the request for service will be granted even if the subpoena calls for attendance in the Requesting State. [31]

In order to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance, Article 17(2) provides that where the document to be served calls for the appearance of a person in the Requesting State the document ordinarily must be transmitted by the Requesting Party to the Requested Party at least thirty days before the scheduled appearance. Thus, if the United States were to ask the Bahamas to serve a subpoena issued pursuant to Title 28, United States Code, § 1783 on a United States citizen in the Bahamas, the request would have to be submitted well in advance of the hearing or trial at which the respondent is expected to appear.

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[31] The language selected for this paragraph is identical to that of Article 13 of the U.S.-Cayman Islands Treaty, but the slightly different interpretation placed on the Requested State's ability to deny requests is due to the Bahamas' different geographical situation. See, e.g., Article 16, discussed supra.

Article 18 – Compatibility with Other Treaties and Internal Laws

The first paragraph states that assistance and procedures provided by this treaty shall not prevent either party from granting assistance under any other international agreement to which it may be a party. It also provides that the treaty shall not be deemed to prevent recourse to any assistance available under the internal laws of either country. Thus, the treaty leaves the provisions of United States and Bahamian law on letters rogatory completely undisturbed, and does not alter any preexisting agreements concerning investigative assistance, such as the Protocol Amending the Single Convention on Narcotic Drugs, 1961, done at Geneva March 25, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975).

The second paragraph is new, and is based on Articles 3 and 4 of the U.S.-Canada Treaty. It provides that a party which needs assistance in a case covered by the treaty must make a request for that assistance pursuant to the treaty unless some other international agreement or arrangement applies. The negotiators intended that the treaty serve as the primary means by which evidence in one country would be made available to law enforcement authorities in the other in cases covered by the treaty. The negotiators recognized, however, that the treaty does not expressly preclude the use of traditional processes and that situations could arise where although an offense was covered by the treaty, the parties could mutually agree to the provision of assistance pursuant to traditional processes. The Bahamian delegation made it quite clear, however, that in its view were the United States to enforce unilateral measures in cases where assistance is available under the treaty in a time fashion, such an action could be completely inconsistent with the spirit of enhanced mutual cooperation reflected in this article. Both delegations agreed that any question about whether a particular enforcement action was consistent with this article would not give rise to any right standing on the part of third parties to oppose such unilateral enforcement measures. Rather, the question would have to be raised by one party to the treaty with the other as a matter between governments. Article 18(2) does not apply to matters not covered by the treaty, such as cases and investigations involving purely tax matters, and in these areas the parties may pursue the needed evidence at any time by any legal means available, including the unilateral use of domestic judicial process.

Article 18(3) provides that the provisions of the treaty do not give rise to any right on the part of a private person to impede execution of a request. Thus, an individual from whom records or testimony are sought would not be free to oppose the execution of the request by claiming that the request fails to comply with the treaty's formal requirements (such as those specified in

Article 5), or attempt to substitute his judgement for that of the Central Authority by deciding whether the substantive requirements of the treaty (such as those in Article 3) have been met.

Article 18(3) further provides that the treaty is not intended to create any right to suppress or exclude evidence obtained thereunder. Therefore, evidence obtained under the treaty by one State from the other State should not be suppressed or excluded from use in judicial proceedings on the ground that the Requesting State's request failed to comply with the provisions of the treaty. This provision is intended to avoid involving the Requesting State's courts in second-guessing the decision of the Requested State to honor the request in the first place.[32] If the individual can point to recognized basis in the ordinary law of the Requesting State for not executing the request or for exclusion of the evidence or for the Requesting State's courts to exclude the evidence, that issue can be decided exactly as it would otherwise be handled. It should be noted that this is a standard provision in our treaties,[33] and has limited applicability in the Bahamas since that country's jurisprudence does not include any exclusionary rule.

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[32] See United States v. Caramian, 468 F.2d 1370 (5th Cir. 1972); United States v Marschner, 470 F.Supp. 201, 202-203 (D. Conn. 1979).

[33] Ellis and Pisani, supra note 1, at 211-212, 221-222. See also United States v Johnpoll, 739 F.2d 702 (2nd Cir. 1984).

Article 19 --Improvement of Assistance

The first paragraph of the article encourages both parties to be aware of the opportunity presented by this agreement to insuring that other aspects of our bilateral relations benefit from the same kind of flexibility and mutual understanding that this treaty reflects, particularly in the area of mutual legal assistance. For instance, it may be appropriate to consider initiating negotiations on the rendering of assistance in civil matters.

The United States experience has shown that as the parties to a treaty of this kind work together over the years various practical ways to make the treaty more effective become evident. The second paragraph of the article calls upon the State to share those ideas with one another and encourages them to agree on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which treaty assistance was utilized and using the treaty to obtain evidence which might otherwise be sought under other methods which might be less acceptable in the Requested State. Very similar provisions are contained in the U.S.- Canada Treaty and the U.S.-Cayman Treaty.

Article 20 – Ratification and Entry into Force

The penultimate article contains standard language concerning the procedure for exchange of the instruments of ratification, and the coming into force of the treaty. It is anticipated that implementing legislation in the Bahamas will be enacted before that country is in a position to exchange instruments of ratification and bring the treaty into operation.

Article 21 – Denunciation

The final article contains the standard provision concerning the procedure for terminating the treaty. The requirement that either Party give six months' notice to the other of an intent to terminate the treaty is not unusual in a treaty of this kind, and is similar to the requirement contained in our mutual legal assistance treaties with Switzerland, Turkey, the Netherlands, and Canada.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, signed at Nassau on June 12 and August 18, 1987, with related notes.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

Senators will recall that earlier this year the Senate debated whether the Bahamas had sufficiently cooperated with U.S. narcotics interdiction efforts to be eligible for U.S. foreign aid under the terms of the Omnibus Drug Act of 1986.

At that time, the Chairman of the Subcommittee on Narcotics and Terrorism, Senator Kerry, reported a State Department finding that 50 to 60 percent of all the marijuana and cocaine that enters the United States comes through the Bahamas. The Senate in its wisdom—wrongly in my judgment—voted to certify the Bahamas as an eligible aid recipient. How can this make sense?

The facts were true then and true today. As Senator Kerry reported, his subcommittee heard testimony that high government officials of the Bahamas, including the Prime Minister, had been bribed by drug traffickers. Testimony revealed that some of the smaller islands have actually been rented by drug traffickers for their exclusive use, and that the problem has been getting worse, not better. News reports suggest that the Prime Minister may be indicted in the U.S. for his activities.

Now the State Department wants us to ratify a Treaty with this same government—one which the report said had significant levels of narcotics corruption by Mexican officials for the express purpose of fighting drug trafficking.

Who would benefit from such an arrangement—U.S. law enforcement, or corrupt officials within the Bahamian government?

The Bahama's situation today parallels the situation that was Panama's only a few years ago. There is a great deal of evidence that Prime Minister Pindling of the Bahamas, like Panama's General Noriega, is deeply involved in the drug trade. The U.S. relationship with Panama has deteriorated precisely because of the drug issue and the State Department's failure to confront this problem when it was first suspected many years ago.

There is plenty of credible evidence that Prime Minister Pindling of the Bahamas has assisted the drug trade. As Senator Kerry reported to the Senate: "It has been corroborated in testimony that * * * $400,000 was paid to the Prime Minister in order to permit drug trafficking. Whole islands have been rented."

Just as the Senate would never consider a treaty with Noriega, it should not consider a treaty with Pindling.

One does not fight the war on drugs by engaging in a partnership with the drug traffickers.

One does not fight drugs by ratifying treaties with governments run by drug traffickers, and thereby bestowing legitimacy on those governments.

Nor does one fight drugs by giving governments run by drug traffickers the right to all sorts of legal evidence and assistance from the U.S. government.

Yet, unless the testimony received by the Subcommittee from the State Department with respect to the Bahamas is mistaken, ratification of this treaty would make the United States partners with drug traffickers. It would bestow legitimacy which they seek. It would grant drug traffickers the right to a high level of information flow from U.S. officials.

Now Senators can easily make the statement that they are fighting drug traffickers by ratifying this treaty as is, just as the State Department is asking. If Senators believe the State Department has been right about Noriega for all these years, and is right about Pindling now, they will doubtless go along with ratification.

But, if Senators want to be serious about fighting drugs, they should demand assurances that senior government officials in the Bahamas are not involved in drug trafficking before this treaty is ratified.

The resolution of ratification for this Treaty should be amended to provide the Senate with such assurances. Specifically, the Senate should require that the Treaty with the Bahamas not be ratified by the President until he certifies to the Senate that the Bahamas "does not have any senior official, including the Prime Minister, who engages in, encourages, or facilitates the production or distribution of illegal drugs." I will propose such an amendment when this treaty is brought before the Senate.

During Committee consideration of this proposal, the argument was made repeatedly again that this mutual legal assistance treaty with the Bahamas is necessary to provide a method of measuring Bahamian cooperation in the war against the drug trade.

However, if past history is any guide, we cannot expect any significant cooperation from the Bahamian government.

History of Bahamian Lack of Cooperation in the War on Drugs

Despite numerous and continuous promises from the Bahamian government that cooperation in the war on drug trafficking is forthcoming, the State Department's own reports criticize the Bahamas for refusing to cooperate fully with U.S. anti-narcotics efforts.

In March of this year, the State Department issued its annual "International Narcotics Control Strategy Report". The State Department summarized the situation in the Bahamas as follows:

> The Bahamas is still burdened by narcotics-related corruption. Moreover, much of the narcotics effort there is directed and facilitated by the United States. There is need for independent Bahamian action.

Can we expect independent Bahamian action, as is called for by the State Department's annual narcotics report? It is doubtful. As the State Department noted on pages 151 and 154 of this same report, the Bahamian government "has not dealt effectively or in a comprehensive fashion with systemic corruption, which continues to make the Bahamas attractive to drug traffickers. * * * Much more needs to be done in order to discourage traffickers from operating in the Bahamas, including energetic enforcement of tough

new anti-drug laws. * * * To date, the Government of the Bahamas has not vigorously enforced the new narcotics legislation."

Should it come as any surprise that the Bahamas has yet to take seriously the U.S. invitation to cooperate in the war on drug trafficking? As previously noted, there is evidence that the Prime Minister of the Bahamas has received hundreds of thousands of dollars from drug traffickers.

In addition, two drug kingpins currently serve in the Bahamian Parliament as members of the PLP, the Prime Minister's political party. In 1984, the Bahamian Commission of Inquiry on Narcotics Smuggling identified Kendall Nottage as a front man for organized crime and drug smuggling. The same commission identified George Smith as guilty of narcotics cooperation. Yet, in 1987, Pindling arranged the nomination of these two drug traffickers to serve in the Parliament, and then appointed Nottage as the Chairman of the Bahamas Broadcasting Corporation.

If the Prime Minister is being bribed by drug traffickers—even going so far as to put drug traffickers in his government—can the United States really expect actual and meaningful cooperation from these same people just because we have signed another Treaty with them?

FLAUNTING OUR EXTRADITION TREATY

An extradition treaty has been in force between the United States and the Bahamas for over 50 years. The treaty was originally signed between the United States and the United Kingdom in London at December 22, 1931, and entered into force on June 24, 1935. An agreement continuing this treaty in force between the United States and the Bahamas was established through exchange of notes at Nassau and Washington on March 7, June 19, and August 17, 1978, entering into force on August 17, 1978.

Despite the existence of this Treaty, the Government of the Bahamas has steadfastly refused to extradite the notorious drug tafficker, Nigel Bowe. Senator Kerry eloquently addressed this issue when he introduced, in March of this year, the resolution disapproving the certification that the Bahamas has cooperated in United States anti-narcotics efforts:

> Besides the corruption, I remain very concerned about the case of Nigel Bowe. Nigel Bowe has been indicted in this country for drug trafficking and is reputed to have directed one of the largest drug trafficking organizations in the Carribbean.
>
> Last year, the (State Department) report noted that the "extradition request for Nigel Bowe has been held up on specious grounds."
>
> This year, the report states that "extradition proceedings against major trafficker Nigel Bowe are proceeding slowly. * * *"
>
> If the Bahamian Government really wants to show genuine signs of cooperation, I can think of no other action that would hold greater positive symbolism than the extradition of Nigel Bowe. * * *

The Senator from Massachusetts was absolutely right: The Bahamas' refusal to extradite Nigel Bowe is already a measure of Bahama's intent—or lack of intent—to cooperate. That measure is the Extradition Treaty of 1935. The State Department should insist that we get cooperation under this existing Treaty before our diplomats go and negotiate new treaties with the Bahamas. The U.S. will have no greater likelihood of extradicting Nigel Bowe as a result of this new treaty.

Dangers of Ratifying This Treaty

Beyond the fact that little meaningful cooperation can be expected to come from the Bahamas under this Treaty, ratification poses great dangers to the national interest of the United States.

Assistance provided to the Bahamas under this Treaty could conceivably assist, rather than deter, the trade in illicit narcotics.

Under Article 1 of the Treaty, the United States is required to provide documents, records, and information, among other things, to the Bahamas.

Under Article 13, the United States is required to provide the Bahamas with certain government and judical documents.

Under Article 4, these documents, records and information must all be provided to the Attorney General of the Bahamas. The Attorney General of the Bahamas is appointed by and owes his position to Prime Minister Pinding.

In reflecting on this treaty, Senators should ask themselves how a Prime Minister who may be indicted for accepting bribes from drug traffickers—or those who owe their positions to the Prime Minister—can be trusted with sensitive U.S. information.

Our ability to trust those people whom we are obligated to assist under this treaty is a vital issue, for much of this treaty is based upon trust.

For example, under Article 1, Section 2 of the Treaty, the United States is required to "provide documents, records and articles of evidence," and "exchange information in relation to the investigation, prosecution and suppression offenses."

However, there is no way that United States law enforcement officers can be certain that drug traffickers would not get—or bribe—Bahamian officials to request their "files" from the United States so they could learn how much U.S. agencies know about their operations.

Under Article 1, Section 2(f), the United States is required to "locate persons" for the Bahamas. However, there is no way that we can be certain that requests to "locate persons" would not be made by Bahamian officials on behalf of drug traffickers looking to find persons in the United States.

Under Article 1, Section 2(h), the United States is required to "immobilize forfeitable assets" on behalf of the Bahamas. However, there is no way for us to be certain that drug traffickers would not influence Bahamian officials to use the treaty to make the United States attach the assets of their "competitors".

These are just three examples of ways this treaty could be abused by unscrupulous Bahamian officials. I have no doubt drug

traffickers will think of many other ways in which this Treaty can be abused.

But the Senate should not give drug traffickers the opportunity to abuse this Treaty, nor should the Senate allow the U.S. government to become partners with drug traffickers.

The Senate should approve an amendment to the resolution of ratification providing that before this Treaty will enter into force, the President must certify to the Senate that there are no senior officials in the Bahamas, including the Prime Minister, who are involved in drug traffickers.

Protecting the Constitutional Rights of Americans

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to this Treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This Treaty seeks to enhance national and international law enforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The Treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the U.S. that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So the question is this: Will this Treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens.

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearings of the Senate Foreign Relations Committee.

Mr. Chairman, there is a dispute among scholars as to whether or not the Constitution of the United States supersedes treaties in all instances. Nor have the courts settled this issue. The State Department has cited *Reid* v. *Covert,* 354 U.S. 1 (1956), as standing for the proposition that the Constitution always prevails where a case concerns matters both within the territorial boundaries of the United States or in foreign lands.

Yet, such an interpretation misreads the *Reid* v. *Covert* holding. This case holds only that executive agreements consummated by the President without advice and consent of the Senate must con-

form to the Constitution in all circumstances. Treaties, however, are not executive agreements; indeed treaties are another matter.

As the distinguished justice and legal scholar, John Marshall Harlan III, wrote in his concurring opinion in *Reid* v. *Covert*, "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. * * * The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." (Harlan, J., concurring, at 74).

Furthermore, in *Missouri* v. *Holland*, 252 U.S. 416 (1920), Justice Holmes suggested that there is no substantive limit to the treaty-making power. In *Ware* v. *Hylton*, 3 Dall. 199, 284 (1796) Justice Cushing wrote that the "Treaty * * * is or equal force with the Constitution.

I wish it were the case that the Supreme Court had conclusively determined that the Constitution is supreme in all cases. But since this determination has not been made, a reservation is necessary to assure that Constitutional rights of Americans are not abridged by the execution of these treaties.

For those who hold the view that the Supreme Court has held that the Constitution supercedes a treaty, then these reservations merely confirm their beliefs. However, if that view is wrong; these reservations will save the day.

In addition, under Article 27 of the Vienna convention on the Law of Treaties—which the State Department perceives as customary international law—no state may "invoke the provisions of its internal law as justification for failure to perform a treaty." So even if we all are agreed that the Constitution—our fundamental internal law—takes precedence, international law seems to be pointing in the other direction.

Indeed, this possibility that the United States might be found in default of international obligations was a major factor in the Committee's approval of the Constitution Reservation to the Genocide Convention.

As the Committee Report on the Genocide Convention stated:

> (T)he problem is that international law does not recognize the Constitution as supreme.
>
> Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may "invoke the provisions of its internal law as justification for its failure to perform a treaty."
>
> Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Just as was the case with the Genocide Convention, a reservation is necessary for this Mutual Legal Assistance Treaty to assure that if a conflict arises between the requirements of the Constitution and those of the Treaty, the United States will not be found to be

in default of its international obligation. That is why a reservation is necessary to make the supremacy of the Constitution a part of the Treaty itself and therefore enforceable.

Specifically, the Senate should add a reservation identical to the Lugar-Helms reservation added to the Genocide Convention. It simply provides that:

> Nothing in this Treaty requires or authorizes legislation or other action by the U.S. prohibited by the U.S. Constitution as interpreted by the United States.

Such a proposal would constitute what some would call a category II amendment. It would be included in the instruments of ratification exchanged with the other countries, yet would require no renegotiation. The other party would simply accept it by ratification, and the constitutional rights of Americans would be secure.

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